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No. 05-1493

IN THE
Supreme Court of the United States

AT&T INC. (F/K/A SBC COMMUNICATIONS INC.),
Petitioner,

v.

RLH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The lower court in this case held that, under the Commerce Clause, there is no *per se* bar on States directly regulating commerce occurring wholly outside their borders. That decision conflicts with the controlling decisions of this Court, as well as the law in several federal courts of appeals. It does, however, accord with the law in the First and Eighth Circuits. This Court's intervention is necessary to resolve the conflict among the lower courts as to a fundamental and recurring constitutional issue.

Respondent RLH Industries, Inc. ("RLH") offers no convincing defense of the California court's decision and, despite its efforts to sow confusion, cannot obscure the clear split between the circuits or the purely legal character of the question presented. RLH's only argument against the Court's exercise of jurisdiction is that leaving the decision below in place would not seriously erode federal policy. That argument fails under this Court's precedents. Denial of review would allow California, at the behest of any of its residents, to control commerce occurring wholly outside its borders and, in so doing, trump the law of the other States where the commerce is occurring. Such extraterritorial regulation threatens not only the free flow of interstate commerce, but also the basic premises of our constitutional structure. The decision at issue here thus imperils federal policy in a much more fundamental and broadly applicable way than the many state-court preemption decisions over which this Court has previously exercised jurisdiction under the same doctrine that RLH concedes is controlling here.

I. The Court Has Jurisdiction To Review The Decision Below

Section 1257(a) authorizes this Court's review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court explained that "the requirement of finality is to be given a practical rather than a technical construction." *Id.* at 478 n.7 (internal quotation

marks omitted). *Cox* recognized "at least four categories of . . . cases" in which the Court had jurisdiction to review a state-court decision on a federal issue "without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.[1] The fourth such category consists of cases where: (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83.

Under this Court's prior decisions, this case falls squarely within the fourth *Cox* category. It is undisputed that the federal issue – whether direct extraterritorial regulation is *per se* invalid under the Commerce Clause – "has been finally decided in the state courts," with the California Court of Appeal resolving the issue against AT&T, and the California Supreme Court denying review. It is further undisputed that, if the Court does not grant review now, AT&T "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." *See* Opp. 9 (conceding that, "[s]hould AT&T prevail on any of its state law defenses, the federal issues could be mooted"). Finally, it is undisputed that reversal of the California court on the federal issue "would be preclusive of any further litigation" on RLH's causes of action against AT&T's out-of-state subsidiaries. Each of those causes of action seeks to apply California law to conduct occurring outside of California.

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[1] *Cox* did not require that the additional proceedings involve only state-law issues. *See* 420 U.S. at 477 ("[i]n most, *if not all*, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date") (emphasis added).

If the Court agrees with AT&T that this extraterritorial regulation violates the Commerce Clause *per se*, that decision will end litigation of RLH's claims.

RLH's sole jurisdictional argument is thus that denial of review would not risk "seriously erod[ing] federal policy." *Cox*, 420 U.S. at 483; *see* Opp. 10.[2] That assertion is demonstrably incorrect: failure to review the California court's decision would have particularly acute consequences for federal policy. The principle that a State may regulate only within its jurisdiction is fundamental to our constitutional structure, finding expression in three separate constitutional provisions: the Commerce Clause, the Due Process Clause, and the Full Faith and Credit Clause. *See* Pet. 14 n.4; *New York Life Ins.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state . . . without throwing down the constitutional barriers . . . upon the preservation of which the government under the Constitution depends."). As the Chamber of Commerce and Verizon have properly emphasized in their *amicus* brief (at 19-20), "[m]ore than 150 years of Dormant Commerce Clause jurisprudence makes it clear that, until Congress says otherwise, no State may dictate to the other 49 a set of nationwide commercial rules."

In setting aside this core principle, the lower court's decision has the immediate effect of permitting any California plaintiff to bring suit under California law to challenge conduct occurring wholly in another State based on the claim that alleged "benefits" to California (e.g., benefits to a single California seller) outweigh the burdens of extraterritorial regulation under a standardless balancing test. The decision similarly invites plaintiffs in all other States to bring suits under their States' laws, thus enabling all States to regulate commerce extraterritorially as

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[2] RLH misquotes *Cox* in stating that the "fourth *Cox* exception is only available when delaying review would 'seriously erode . . . Constitutional policy,' *Cox*, 420 U.S. at 483." Opp. 10.

long as the plaintiff can assert some effect on a claimed interest of the State. Failure to grant review would thus seriously erode the "basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm*, 538 U.S. at 421-22.

This Court has consistently found decisions involving *less* fundamental federal interests to be within the fourth *Cox* category. Contrary to RLH's suggestion that this category is limited to First Amendment cases, *see* Opp. 10, the Court has regularly granted review under *Cox* to safeguard particular federal statutes from state encroachment. *See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988) (taking jurisdiction to address whether FERC order preempted a state agency from inquiring into the prudence of a plant); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (taking jurisdiction to address whether federal law barred an additional workers' compensation award based on state standards); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (reviewing a state-court decision regarding preemption under the National Labor Relations Act).[3] The threat to federal policy is significantly greater here, where the issue is not the preemptive scope of a single federal law, but the basic rules of the road limiting what States may regulate under our constitutional structure.

The two cases relied upon by RLH are readily distinguishable. In *Flynt v. Ohio*, 451 U.S. 619 (1981) (per curiam), the Court found "no identifiable federal policy that

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[3] *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (Employee Retirement Income Security Act preemption); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (Federal Arbitration Act preemption); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) (exemption of state fair trade act from prohibitions of the Sherman Act); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963) (venue under national banking legislation); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-51 (1963) (National Labor Relations Act preemption).

will suffer if the state criminal proceeding goes forward" because there was "no reason to treat this selective prosecution claim differently than we would treat any other claim of selective prosecution." *Id.* at 622-23. *Johnson v. California*, 541 U.S. 428 (2004) (per curiam), involved a *Batson* claim, and the Court concluded that "petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim." *Id.* at 430. Unlike *Flynt* and *Johnson*, this case does not involve the application of a well-settled constitutional rule to particular facts. Rather, it involves a purely legal question of enormous general policy significance: whether direct extraterritorial regulation is a *per se* violation of the Commerce Clause.

II. The Circuits Are In Square Conflict Over Whether Direct Regulation Of Wholly Extraterritorial Conduct Is A *Per Se* Violation Of The Commerce Clause

Nothing in RLH's opposition brief diminishes the sharp conflict between the circuits on the question whether extraterritorial regulation is unconstitutional *per se*. The Second, Seventh, Ninth, and Tenth Circuits have clearly endorsed the *per se* rule, finding it unnecessary to rely on the balancing test of *Pike* to invalidate a state statute controlling conduct occurring wholly outside the State. *See American Booksellers Found.*, 342 F.3d at 103-04 (2d Cir.) ("no need to apply the *Pike* balancing test" because Vermont had "projected its legislation into other States" and "directly regulated commerce therein, in violation of the dormant Commerce Clause") (internal quotation marks omitted); *National Solid Wastes*, 63 F.3d at 657-60 (7th Cir.) (invalidating statute that "essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce" without engaging in *Pike* balancing); *NCAA*, 10 F.3d at 639-40 (9th Cir.) (Nevada statute with "extraterritorial effect" was "a per se violation of the Commerce Clause"); *ACLU*, 194 F.3d at 1161 (10th

Cir.) (New Mexico statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause"). RLH attempts to muddy the issue by claiming that these decisions invalidated statutes after determining that in "practical effect" the statutes "unduly burdened" interstate commerce. Opp. 12-14. RLH is wrong. Each of these decisions held that, because the statute at issue regulated wholly extraterritorial conduct, it was invalid *per se*. *See American Booksellers*, 342 F.3d at 104; *National Solid Wastes*, 63 F.3d at 658; *NCAA*, 10 F.3d at 640; *ACLU*, 194 F.3d at 1161.

These circuit court decisions thus squarely conflict with the decision below, which conceded that RLH's lawsuit sought to control commercial conduct outside of California, but held that its constitutionality nevertheless turned on the outcome of a balancing test. *See* Pet. App. 15a-16a. Indeed, the lower court believed that this Court's *per se* rule against direct extraterritorial regulation was restricted to the context of price-affirmation statutes, a proposition that the Second and Seventh Circuits have specifically rejected. *Compare id.* at 13a with *American Booksellers*, 342 F.3d at 103-04, and *National Solid Wastes*, 63 F.3d at 659-60.

Like the California court, the First and Eighth Circuits have refused to recognize the *per se* rule against direct extraterritorial regulation. *See Grant's Dairy*, 232 F.3d at 19 ("th[e] reference to direct regulation as a basis for invalidation has not been repeated in subsequent Supreme Court opinions and it does not fit into the *West Lynn* framework") (citations omitted); *Southern Union*, 289 F.3d at 508 ("[i]n its recent Commerce Clause decisions, the Supreme Court has limited its per se rule of invalidity to provisions that patently discriminate against interstate trade") (internal quotation marks omitted). RLH does not deny that these decisions reject the *per se* rule; rather, RLH argues that the First Circuit's position is better encapsulated in *Pharmaceutical Research & Manufacturers*

of America v. Concannon, 249 F.3d 66 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003), than in *Grant's Dairy*, and that the Eighth Circuit's position is better represented in *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), than in *Southern Union* (despite the fact that *Southern Union* is the more recent case). *Concannon*, however, dealt with a statute that it found did *not* regulate transactions or conduct occurring wholly outside the State, *see* 249 F.3d at 81-82; thus, it did not have to hold that such direct extraterritorial regulation was or was not *per se* unconstitutional. Similarly, because *Cotto Waxo* found that the statute at issue did not have "extraterritorial reach," 46 F.3d at 793-94, it too did not need to hold that direct extraterritorial regulation was or was not *per se* invalid.

III. The Decision Below Conflicts With Controlling Supreme Court Law

RLH does not dispute that this Court has endorsed a two-tiered approach to dormant Commerce Clause jurisprudence: a state statute that "*directly regulates* . . . interstate commerce" is unconstitutional "*without further inquiry*," while a statute that "has only indirect effects on interstate commerce and regulates evenhandedly" is unconstitutional if "the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (emphases added). As the Court explained in *Healy*, "the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*." 491 U.S. at 336 (emphasis added; alteration in original).

Nevertheless, RLH contends that the lower court "correctly applied the first tier of this Court's two-tier Commerce Clause analysis." Opp. 17. That is manifestly false. The lower court simply ignored the *per se* "first tier" of the Court's analysis by stating that, in all cases, Commerce Clause jurisprudence "focuses on the *balance* between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on

the location of the challenged conduct." Pet. App. 15a (emphasis added). RLH's argument that the lower court sanctioned extraterritorial regulation only when out-of-state conduct causes harm in California, *see* Opp. 19, is beside the point. Controlling wholly out-of-state conduct is impermissible "*whether or not* the commerce has effects within the State," *Healy*, 491 U.S. at 336 (emphasis added; internal quotation marks omitted).

RLH's suggestion that other jurisdictions have upheld state antitrust statutes with "incidental effects" on interstate commerce, Opp. 19-20, is similarly irrelevant. The impact on interstate commerce here is direct, rather than an "incidental" consequence of regulation of in-state activity. *See* Pet. 11-12.

Finally, contrary to RLH's assertion, AT&T never conceded "that a nexus between out-of-state anticompetitive conduct and in-state impact upon *consumers or markets*" would prevent extraterritorial regulation from violating the Commerce Clause. Opp. 22. Rather, AT&T explained that direct regulation of wholly extraterritorial conduct is impermissible even when that conduct has in-state effects, but that the lower court also erred in concluding that any injury to RLH from the alleged conduct of AT&T's out-of-state subsidiaries amounted to a substantial effect on California commerce. *See* Pet. 12-13. In any event, the distinction between an impact on markets and an impact solely on a potential plaintiff is hardly a "distinction without a difference," Opp. 22, in antitrust law. *Matsushita* specifically found that an injury to plaintiffs, which were U.S. companies, did not amount to an effect on U.S. commerce warranting application of the Sherman Act. 475 U.S. at 582 & n.6. Similarly, an injury to RLH is not a substantial effect on California commerce.

IV. This Case Is A Superior Vehicle For The Question Presented

This case cleanly presents a pure question of law: whether direct regulation of wholly extraterritorial conduct is a *per se* violation of the Commerce Clause, or

whether its constitutionality turns on the outcome of a balancing test. RLH attempts to obscure the question presented by distorting the facts of the case. RLH first suggests that the claims at issue in this petition are based on RLH's efforts to sell HVP devices in California. *See* Opp. 3. That is false: RLH asserted claims based on its activities in California only against Pacific Bell, the local telephone company in California. RLH could not assert such claims against AT&T's out-of-state subsidiaries, which do not provide local telephone service in California, and thus could not have prevented California customers from purchasing RLH's equipment through any alleged tying arrangement. The claims against Pacific Bell have been dismissed and are not at issue here. *See* Pet. 4 n.2.

Nor does AT&T "fail[] to acknowledge that its conduct has caused injury to California commerce," Opp. 4. The only injury from the alleged anticompetitive conduct of AT&T's out-of-state subsidiaries identified by RLH is to RLH itself, and an injury to a California plaintiff is not an injury to California commerce. Even now, RLH relies on the "'ripple' effects" of the harm to RLH on RLH's employees and suppliers. Opp. 5 n.3. But if such "ripple effects" of injury sustained by a California resident in its efforts to compete outside the State constitute an injury to California commerce, then the "ripple effects" of injuries to the plaintiffs in *Matsushita* would surely have constituted an effect on U.S. commerce. On that theory, any State would be able to regulate commerce occurring in other States that has a financial impact on one of its residents.[4]

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[4] RLH is also wrong to suggest that "California was the locus of part of the allegedly wrongful conduct" described in RLH's complaint. Opp. 4. RLH did allege in its Second Amended Complaint that an employee of "PacBell and/or SBC" based in California, Don Murray, participated in a uniform decision by AT&T's non-California subsidiaries not to approve use of RLH's HVP equipment. Pet. App. 32a (¶ 24). However, it is undisputed that Mr. Murray was in fact an employee of a third party, SBC Services, Inc., not of SBC Communications Inc. or of Pacific Bell. Before the Court of Appeal, RLH did not rely on any alleged in-state conduct by Mr. Murray as a basis for application of California law

RLH further errs in suggesting that any factual disputes regarding the status of filed tariffs in other States bear on the Court's consideration of the question presented. While the existence of these tariffs illustrates the inconsistent regulation that results when States govern extraterritorially, it is irrelevant to the question whether RLH's lawsuit violates the Commerce Clause *per se*. The point of a *per se* rule is precisely that constitutionality does not turn on the extent of the conflict in a particular case.

RLH's next error is to claim that the decision below is of limited practical significance. In fact, the decision is highly significant because it squarely rejects the core principle that a State may not regulate conduct occurring wholly outside its borders. The lower court's decision is of particular concern because it is not restricted to the context of state antitrust statutes. Indeed, the court held that the *per se* rule against direct extraterritorial regulation was itself restricted to the context of price-affirmation statutes. *See* Pet. App. 13a. The decision thus has enormous practical import: it requires companies across the nation that conduct no business in California or with California consumers to conform their actions to California law, given the possibility that a California resident may believe itself injured by conduct outside the State. *See* Pet. 19-23.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

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to the activity of AT&T's non-California subsidiaries. *See* Appellant's Reply Br. at 17-25. The court itself similarly did not rely on any alleged conduct by Mr. Murray.

[5] RLH suggests in passing that the Court's denial of certiorari in *Beretta U.S.A. Corp. v. District of Columbia*, 126 S. Ct. 399 (2005) (No. 05-118), means that it should deny review here. The lower court in *Beretta*, however, found that the state statute at issue did not directly regulate commerce outside the State. *See District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 657 (D.C. 2005). Thus, *Beretta* did not squarely present the issue raised in this petition.

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